No. 16,247

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff,

vs.

237,500 ACRES OF LAND, MORE OR LESS, IN THE COUNTIES OF INYO AND KERN, STATE OF CALIFORNIA, etc., et al.,
Defendants.

L. MILLS BEAM and ROBERT THOMAS (Lode Claimants),
Appellants,

vs.

B. J. COMPTON, IRMA COMPTON, HAROLD OLSON, IRMA OLSON, W. H. MONTGOMERY, ROY HOOPER, R. B. WALKER and GENE DELANEY (Placer Claimants),
Appellees.

Appeal from Judgment for Distribution of Funds Deposited as Just Compensation for Condemnation and Taking of Mining Claims, United States District Court, Southern District of California, Northern Division.

Honorable Gilbert H. Jertberg, Judge.

APPELLEES' BRIEF.

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Subject Index

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APPELLEES' BRIEF.

STATEMENT OF THE CASE.

An order was made in the parent case fixing Monday, September 16, 1957, at 10 A.M., before the United States District Court, Southern District of California, Northern Division, in the court of the Honorable Gilbert H. Jertberg, sitting at Fresno, as the date of hearing to determine how and to whom distribution ought to be made of awards theretofore made for some eighteen separate parcels of land condemned and taken in the parent case, among which were included Parcels 549 and 552.

Appellant L. Mills Beam, representing appellant Robert Thomas through power of attorney, appeared claiming the award for Parcel 549 for the said Robert Thomas as locator of Morning Sun Lode mining claim on February 19, 1945. Appellees B. J. Compton, Irma Compton, Harold Olson, Irma Olson, W. H. Montgomery, Roy Hooper, R. B. Walker and Gene Delaney appeared claiming the award for Parcel 549 by reason of placer locations Strate Line Pumice Nos. 4 and 5 made in May, 1940, and Strate Line Pumice Nos. 4 and 5 (Amended) made in October, 1940. Although the original location notices and the amended notices for the Strate Line Pumice claims were signed by J. B. Compton, Don Compton, Irma Compton, Leora Compton, Walter Buass, Marie Compton, R. E. Galloway and Shirley Compton, said placer claims were in the actual possession and ownership of the Appellees as copartners doing business as Strate Line Pumice Company and were claimed by them to be valid and existing on March 30, 1945, when the order of posses-

sion was granted to the United States with respect to the parcel.

Appellant L. Mills Beam appeared claiming the award for Parcel 552 as the locator of Thomas Lode mining claim on February 14, 1945. Appellees appeared claiming the award for Parcel 552 by virtue of the Strate Line Pumice placer claims, original and amended, mentioned in the previous paragraph, as copartners of Strate Line Pumice Company, and of which the Appellees were in possession and ownership and claimed by the Appellees to be valid and existing on March 30, 1945, when the order of possession was made by the Court in respect to that parcel.

The notice of hearing further notified those claiming the awards and sums on deposit in the registry of the court, that they "should be prepared to show what title or interest you had in the parcel or parcels hereinafter set forth, *at the time plaintiff's complaint in condemnation, or at the time its Declaration of Taking was filed in the subject action . . .*" (Emphasis added.)

All placer claimants appeared by Frederick E. Hoar, Esq., who now appears for the same Appellees. We emphasize this at the outset because Appellants erroneously assert on this appeal that only B. J. Compton appeared. This error no doubt stems from the fact that only B. J. Compton appeared and testified at the hearing in person. As the one of the placer claimants who did all of the "ground work" and was thoroughly acquainted with all phases involving the placer locations, the copartnership of the Appellees,

subsequent notices of election to hold during the period of moratoria and suspension of activities, it sufficed to amplify the documentary proof by his oral testimony.

It will be noted, however, that the proof of the Appellants was documentary only; L. Mills Beam, one of the Appellants, appeared personally in court, but he did not offer any testimony or other evidence to rebut the testimony of Mr. Compton, which fact is mentioned in the order of the court filed November 25, 1957, hereinafter copied into this brief.

Documentary evidence was submitted on September 16, 1957 and the case taken under advisement; it was re-opened and more thoroughly explored on October 7, 1957 and again submitted, permission being solicited and granted to Appellees to secure and file a certified copy of the amended location of Strate Line Pumice No. 5; and permission was granted Appellants to file a certificate of the County Clerk concerning lack of any articles of incorporation of Strate Line Pumice Co., Inc., in the Inyo County Clerk's office at Independence.

After Appellees in due course filed with the Court the certified copy of the amended location of Strate Line Pumice No. 5 Appellants' counsel by letter dated October 19, 1957 sought the Court's permission to file a "Certificate" of A. A. Brierly, a surveyor of Independence, California, to the effect that on October 19, 1957, he went upon the property described as Section 6, Township 22 South, Range 39

East, M.D.M. in Inyo County, had found the "original notice of location" for the Thomas lode claim, and that upon following the description shown in said notice, it was the "opinion" of the said surveyor that the Thomas Lode claim was located "partly in the *South* half of the Southwest Quarter of said Section Six and partly in the *South* half of the Southeast quarter of said section . . ." (emphasis added) and that the Morning Sun Mining Claim "was examined and found to be located in the *South* Half of the Southeast quarter of said Section Six" (emphasis added). The significance of the foregoing was that in "supplemental petition to allege more recently ascertained facts" and by Exhibit "C" which was made part of the petition "for evidence," L. Mills Beam had placed his Thomas Lode mining claim, Parcel 552, in the *North Half* of the South Half, and in his petition for the award of compensation for the Morning Sun Lode mining claim, filed by Beam representing Robert Thomas by power of attorney, by Exhibit "D" and "made part hereof for evidence herein of the locations of the Morning Sun Lode Claim with reference to the adjacent Thomas Lode claim (Parcel 552 of L. Mills Beam)," said L. Mills Beam had placed the said Morning Sun Lode mining claim, Parcel 549, also in the *North Half* of the South Half, abutting the Thomas Lode mining claim of L. Mills Beam. *In the North Half the lode claims were overlays of and overlapped the placer claims.*

Appellees promptly objected by letter of October 21, 1957, to this bald attempt to repudiate a position

tardily found to be untenable, and wrote to the trial judge as follows, in part:

> "However, we would respectfully object to the reception of the instrument at this late date as part of the proof of the adverse parties. The purpose of the instrument appears to be to contradict the proof already offered by Beam and Thomas as to the part of Section 6 in which the lode claims were located. We believe the instrument, offered for the purpose of impeaching the showing already before the Court on behalf of the claimants Beam and Thomas, is hardly the proper way of offering such proof. It further appears, on examination, that the location of the Beam and Thomas claims, on the ground, is opinion evidence only — Mr. Brierly's certificate states '. . . it is my opinion . . .' This is a poor method of impeaching the positive evidence over the signatures of the adverse parties, who may be assumed to know where their claims were located, as to that location. Lastly, there is afforded no right of cross examination.
>
> Permission to supplement the record by the filing of one certified copy of a pertinent instrument would not seem to warrant adverse counsel in submitting further argumentative evidence without right of cross examination. It is respectfully submitted the offer ought to be denied, both on technical grounds and substantive grounds."

On October 24, 1957, the Honorable Judge Jertberg wrote to Appellant's counsel, Mr. Dague as follows:

> "I have your letter of October 19th. In your letter you state that you are enclosing certificate of A. A. Brierly, Inyo County Surveyor, of the

> Thomas Lode and the Morning Sun Lode. The certificate refers to 'the original Notice of Location made by L. Mills Beam, February 11, 1945' and states that a copy is attached to the certificate. There is no such copy attached. Furthermore, the certificate states that there is attached a pencil sketch of said locations. No such sketch is attached.
>
> You request that the original Notice of Location as well as the sketch be received in evidence. There is no proper foundation for the receiving of such documents in evidence even if they had been attached to the certificate. I, therefore, will have to deny your request to receive such documents in evidence."

On November 25, 1957, the Court filed its "Order on the Distribution of Funds Deposited into the Registry of this Court." The order was in favor of the Appellees herein and was followed in due course by Findings of Fact, Conclusions of Law and Judgment.

Appellants' motions to vacate, set aside or modify the judgment, or to grant a new trial, were and each of them was denied by written order dated and filed April 30, 1958, and they now appeal. We would close this Statement of the Case with this observation: Appellees feel that certain portions of Appellants' brief wherein they attack the United States' attitude in the matter, falsely imputing to the United States Attorney, appearing by Mr. Albert N. Minton, Assistant U. S. Attorney, Southern District of California, bias favoring the Appellees, are not warranted

by the record and border on scandalous and impertinent matter. Mr. Minton took no part other than to "prepare and file the form of appropriate order for distribution of funds in accordance" with the Court's order of November 25, 1957, and his position was made clear by this brief statement:

> "Mr. Minton. If the Court please, I am entirely disinterested, an onlooker here in this controversy. I hold the money, and I am willing to give it to whomsoever the Court decides should have it." (Rep. Tr. p. 90, lines 8-11.)

This statement was made in response to the Court's query, "Do you have anything to say, Mr. Minton."

THE ISSUES INVOLVED.

Much confusion has been injected into this proceeding, which concerns only Parcels 549 and 552, by Appellants' reference to an award in the parent case for *Parcel 553*. Parcel 553 is in no wise involved, but since, through coincidence, the award for Strate Line *Leterbe* Pumice Placer mine or the *LET-ER-BE* mine, Parcel 553, was made to the same placer claimants who have been awarded compensation for the condemnation and taking of Parcels 549 and 552, which are the placer locations Strate Line Nos. 4 and 5 as originally made in May, 1940, and Strate Line Nos. 4 and 5 (Amended) made in October, 1940, the Appellants insist that Appellees have been fully compensated. It is much the same as saying that where Lot "X" and Lot "Y" are owned by the same indi-

vidual and that individual is paid for the condemnation and taking of Lot "X" he is automatically compensated for the taking of Lot "Y". Except for the pertinacity with which Appellants iterate and reiterate the fallacy, the assertion might have been passed without notice. Strate-Line *Let-er-Be* Pumice Placer, Parcel 553, for the condemnation and taking of which the same persons who are Appellees here had theretofore received compensation, was situated in the *North Half* of Section 6, Township 22 South, Range 39 East, M.D.B.M. Both the lode and placer claims comprising Parcels 549 and 552, involved in the present appeal, were in the *South Half* of the section, and both concededly in the *North Half* of that South Half, until the Appellants caught in the web of trespass and charged with overlaying the placer locations with lode locations, belatedly sought after the submission of the case by the Court-spurned certificate of A. A. Brierly, to shift the locality of the lode claims to the *South Half* of the South Half of Section 6.

By judgment entered October 11, 1956 in the parent case the Court had fixed the compensation and determined the absence of interest of certain parties, and wherein it was determined that Robert Thomas, one of the parties Appellants, and Appellees herein were the parties having an interest in *Parcel 549* (the Morning Sun Lode) *"as their interests may appear, and that no other person or persons has or have any interest or right to said parcel and shall take nothing,* and fixing the fair market value of said Parcel 549

on March 20, 1945, the date of filing the complaint, at $350.00. Similarly, by the aforesaid judgment, it was determined that L. Mills Beam, the other of the parties Appellant, (and Rheem Manufacturing Company and Great Lakes Carbon Company, the latter two making no appearance of any kind at the hearings of September 16 or October 7, 1957), and *Strate Line Pumice Company, Strate Line Pumice Company, Inc.* and the Appellees herein were the parties having an interest in *Parcel 552* (the Thomas Lode) *"as their interests may appear, and that no other person or persons has or have any interest or right to said parcel and shall take nothing."*

The fair market value of said Parcel 552 as of March 20, 1945, the date of filing the complaint for condemnation, was fixed at $2,500.00. The Court retained jurisdiction to disburse the funds.

From evidence in the case given on the summary hearing to determine to whom the money should go the Court found that the Appellees operated under the partnership name of Strate Line Pumice Company, and that these eight subsequently formed a corporation under the laws of the State of Nevada, known as the Strate Line Pumice Company, Incorporated; that this corporation was never authorized to do business in California, and "it is now and was at the time the order of possession was entered on March 30, 1945, an inoperative and defunct corporation." Thus it was that the claims of the partnership and the defunct corporation were identified as being identical with the claims of the Appellees, and vice versa.

It will therefore be seen that although the original and amended notices for the *Strate Line* Pumice claims Nos. 4 and 5, made respectively in May and October, 1940, were signed by B. J. Compton, Don Compton, Irma Compton, Leora Compton, Walter Buass, Marie Compton, R. E. Galloway and Shirley Compton, nevertheless, at the time the parent suit for condemnation, No. 311-ND Civil, was filed and at the time of the taking of the Parcels 549 and 552, ownership of the pumice claims was in the Appellees herein. Whether the ownership was by virtue of transfer of title from the actual locators, or whether the actual locators acted as agents or servants of the partnership, is not of consequence, and need not be explored, for the *fact* was, and so found by the Court in its judgment entered October 11, 1956 that the Appellants and Appellees named herein were the only persons entitled to the compensation awarded for Parcels 549 and 552, "as their interests may appear, and that no other person or persons has or have any interest or right to said parcels and shall take nothing."

Since all intendments are in favor of the summary judgment of the trial court disbursing the funds, it would seem the burden rested on the Appellants to show the absence of mesne conveyances vesting title in Appellees as of the time the government's suit in condemnation was filed, or the claims taken. The trial court further determined that the notices filed during the moratoria and period of suspension were filed by the Appellees herein as "the placer claimants."

The issues involved, then, were not complicated. The placer claimants, Appellees herein, claimed the awards of just compensation made with respect to both Parcels 549 and 552 on the ground that the placer claims were owned by them and valid and existing on March 30, 1945, when the order of possession was granted to the United States with respect to both parcels, and that the lode claimants were trespassers on the placer claims at the time the lode claims were filed and that there were no lodes or veins discovered or existing at the time such lode claims were filed. Appellees further asserted the lode locations were "overlays" of valid placer locations. B. J. Compton, one of the Appellees, supplemented Appellees' documentary evidence by oral proof.

Appellants asserted the validity of their lode locations and at the hearing relied on documentary proof. Robert Thomas, one of the Appellants, appeared by L. Mills Beam acting under power of attorney from Mr. Thomas, and did not come personally into court or give testimony. Mr. Beam, the other Appellant, was present in court but did not offer any testimony or other evidence to rebut the testimony of Mr. Compton, which fact the Court noted. After submission of the matter, Appellants sought to introduce the certificate of A. A. Brierly, which as hereinbefore shown, was not permitted by the Court. Then, on motion for new trial or to vacate, set aside or modify the judgment, and based entirely upon the contents of letters written from the Sacramento Land Office of the Bureau of Land Management of the United

States Department of the Interior to Mr. Samuel M. Dague, Appellants' counsel, one dated November 19, 1957, and one dated December 10, 1957, appended as Exhibits "B" and "C" to Appellants' Opening Brief herein, which adverse counsel is pleased to call "Land Office Decision," Appellants assert that any interest of the Appellees herein and to Strate Line Pumice Nos. 4 and 5 as originally located in May, 1940 and the subjects of Amended Locations in October, 1940, were declared invalid by decision of the Commissioner of the General Land Office dated June 26, 1946. It is the contention of Appellees that any decision of the Commissioner, even if made, did not affect the status of the Appellees as copartners of Strate Line Pumice Company, placer claimants to the awards herein.

ARGUMENT.

Appellees find it difficult to follow the argument of Appellants, or to answer all of the matters suggested in the opening brief, by reason of lack of cohesion, continual reference to the award for Parcel 553 not involved herein, and references to matters outside of the record. We shall be satisfied to present our argument under two headings:

I. The Order for the Distribution of Funds Deposited in the Registry of the Court to Appellees Herein Was Proper.

II. Any Decision of the Commissioner of the General Land Office Did Not Affect the Status

of the Appellees as Copartners of Strate Line Pumice Company.

I. THE ORDER FOR THE DISTRIBUTION OF FUNDS DEPOSITED IN THE REGISTRY OF THE COURT TO APPELLEES HEREIN WAS PROPER.

On this point we adopt as our argument the facts and the law as set forth in the Order of the Honorable Gilbert H. Jertberg, filed in the case, as follows:

Order of the Distribution of Funds Deposited Into the Registry of This Court.

"On the 20th day of March, 1945, plaintiff filed herein its complaint in condemnation describing the following parcels of land, to wit: Parcel 549 (Morning Sun Lode), and Parcel 552 (Thomas Lode), and on March 30, 1945, an order was entered granting the plaintiff immediate possession of the parcels.

On October 11, 1956, the Court made and entered herein findings of fact, conclusions of law, judgment and decree, which were docketed on October 15, 1956, fixing compensation and determining the absence of interest of certain parties herein and whereby it was found and determined by the Court:

(1) That the defendants having an interest in Parcel 549 (Morning Sun Lode) are Robert Thomas, Robert M. Thomas, B. J. Compton, Irma Compton, Harold Olson, Irma Olson, Harold Olsen, Irma Olsen, W. H. Montgomery, Roy Hooper, R. B. Walker, and Gene Delaney, *as their interests may appear,* and that no other person

or persons has or have any interest or right to said parcel and shall take nothing;

(2) That the defendants having an interest in Parcel 552 (Thomas Lode) are L. Mills Beam, L. Miles Beam, Rheem Manufacturing Company, Great Lakes Carbon Company, Strate Line Pumice Company, Strate Line Pumice Company, Inc., B. J. Compton, Irma Compton, Harold Olson, Irma Olson, W. H. Montgomery, Roy Hooper, R. B. Walker, Gene Delaney, Harold Olsen, Irma Olsen and Miles Beam, *as their interests may appear,* and that no other person or persons has or have any interest or right to said parcel and shall take nothing;

(3) That the fair market value of said parcels was on March 20, 1945, as follows:

Parcel 549 (Morning Sun Lode)	$350.00
Parcel 552 (Thomas Lode)	$2,500.00

(4) The right to just compensation for Parcel 549 (Morning Sun Lode), and Parcel 552 (Thomas Lode) passed to and became vested in the following amounts respectively:

Parcel 549 (Morning Sun Lode)

Robert Thomas	
Robert M. Thomas	
B. J. Compton	
Irma Compton	
Harold Olson	
Irma Olson	
Harold Olsen	
Irma Olsen	
W. H. Montgomery	
Roy Hooper	
R. B. Walker	
Gene Delaney	$350.00

Parcel 552 (Thomas Lode)

L. Mills Beam
L. Miles Beam
Rheem Manufacturing Company
Great Lakes Carbon Company
Strate Line Pumice Company
Strate Line Pumice Company, Inc.
B. J. Compton
Irma Compton
Harold Olson
Irma Olson
Harold Olsen
Irma Olsen
W. H. Montgomery
Roy Hooper
R. B. Walker
Gene Delaney
Miles Beam $2,500.00

for which defendants the Court awards said sums set opposite the parcel number to the defendants having interests in said parcels, *as their interests may appear,* together with interest thereon at the rate of 6 per cent per annum from the 30th day of March, 1945, to and including the date upon which the plaintiff shall deposit said sums into the registry of the Court;

(5) That no other persons are entitled to any compensation for the taking of said parcels and shall take nothing;

(6) That the following defendants are granted judgment, respectively, against the United States of America in the following sums, together with interest at the rate of 6 per cent from the 30th day of March, 1945, to and including the date of the deposit of said funds in the registry of the Court:

Parcel 549 (Morning Sun Lode)

Robert Thomas
Robert M. Thomas
B. J. Compton
Irma Compton
Harold Olson
Irma Olson
Harold Olsen
Irma Olsen
W. H. Montgomery
Roy Hooper
R. B. Walker
Gene Delaney $350.00

Parcel 552 (Thomas Lode)

L. Mills Beam
L. Miles Beam
Rheem Manufacturing Company
Great Lakes Carbon Company
Strate Line Pumice Company
Strate Line Pumice Company, Inc.
B. J. Compton
Irma Compton
Harold Olson
Irma Olson
Harold Olsen
Irma Olsen
W. H. Montgomery
Roy Hooper
R. B. Walker
Gene Delaney
Mills Beam $2,500.00

for which defendants may have judgment *as their interests may appear.*

(7) That the Court retain jurisdiction to make and enter such further orders and judgment

as may be necessary and proper in the premises. (Italics added.)

On the second day of August, 1957, this Court made an order fixing Monday, the 16th day of September, 1957, as the date for a hearing to determine how and to whom distribution of the award heretofore made for the above described parcels of land should be distributed, and notifying the persons above named to appear and show what interest, if any, they have in the just compensation awarded by this Court for the taking of said parcels.

Service of the Order to Show Cause and notice of hearing was made by United States mail on all persons and corporations above mentioned. The hearing above mentioned came on before the Court on September 16, 1957. The plaintiff was represented by Laughlin E. Waters, United States Attorney, Albert N. Minton, Assistant United States Attorney appearing. The defendants, B. J. Compton, Irma Compton, Harold Olson, Irma Olson, Harold Olsen, Irma Olsen, W. H. Montgomery, Roy Hooper, R. B. Walker, Gene Delaney, Strate Line Pumice Company, and Strate Line Pumice Company, Inc., were represented by Frederick Hoar. The defendants, Robert Thomas, also known as Robert M. Thomas, and L. Mills Beam, also known as Mills Beam, L. Miles Beam and Miles Beam, were represented by Samuel McK. Dague. No appearance of any kind was made on behalf of the Rheem Manufacturing Company or the Great Lakes Carbon Company.

The matter was partially heard on September 16, 1957, and was regularly continued for further

hearing until the 7th day of October, 1957. At said hearing oral and documentary evidence was offered and received on behalf of the claimants appearing. Following said hearing, legal memoranda were submitted on behalf of the claimants appearing, and the matter was submitted to the Court for its decision.

It appears from the evidence that in May, 1940, two placer mining claims were located on the parcels in question by B. J. Compton, Irma Compton, Harold Olson, Irma Olson, W. H. Montgomery, R. B. Walker, Roy Hooper and Gene Delaney, who operated under the partnership name of Strate Line Pumice Company. These eight subsequently formed a corporation under the laws of the State of Nevada, known as the Strate Line Pumice Company, Incorporated. This corporation was never authorized to do business in California, and it is now and was at the time the order of possession was entered on March 30, 1945, an inoperative and defunct corporation.

The evidence discloses that on February 11, 1945, L. Mills Beam, also known as L. Miles Beam and Miles Beam, filed a notice of location of a lode mining claim on Parcel 552, and on February 16, 1945, Robert Thomas, also known as Robert M. Thomas, filed a notice of location of a lode mining claim on Parcel 549.

One of the placer claims, known as Placer Claim No. 4, was located on the same land on which Parcel 552, and a part of Parcel 549 were located, and the other placer claim known as Placer Claim No. 5, was located on the same land on which the remainder of Parcel 549 was located.

The defendant L. Mills Beam, also known as Miles Beam and L. Miles Beam, claims the award of just compensation made with respect to Parcel 552, and Robert Thomas, also known as Robert M. Thomas, claims the award of just compensation made with respect to Parcel 549, on the ground that the placer claimants had allowed their claims to lapse during the years of the Second World War, when the requirement of annual assessment work was suspended under what were known as 'moratoria statutes'. (Title 30 U.S.C.A. section 28a.)

The placer claimants claim the awards of just compensation made with respect to both parcels on the ground that their placer claims were valid and existing on March 30, 1945, when the order of possession was granted to the United States with respect to both parcels, and that the lode claimants were trespassers on the placer claims at the time the lode claims were filed, and that there were no lodes or veins discovered or existing at the time such lode claims were filed.

Section 28 of Title 30 U.S.C.A. provides that the locator of a mining claim, in addition to other requirements, must perform not less than $100 worth of labor or that improvements in that amount must be made on the claims each year. Failure to comply with the requirement of the 'assessment work' forfeits the claim of the locator. On May 7, 1942, a statute was enacted which amended the provisions of Section 28, by providing that the requirement of annual assessment work would be suspended from July 1, 1941 to the end of hostilities, which was December 31, 1946, and in order for a locator to hold a claim,

he was required to file a notice that he wished to hold it, before noon of July 1st of each year.

The placer claimants filed the following notices during the period of the suspension:

1. June 29, 1942, for the period July 1, 1941 to July 1, 1943.

2. March 7, 1944, for a period of a year. The notice was undated, but the notary certificate and the recording date show that it was intended for the year July 1, 1943 to July 1, 1944.

3. Notice filed July 11, 1945, for the year ending July 1, 1945.

The lode claimants contend that the notices were defective, and that therefore the land was open for location in February of 1945 when the lode locations were filed, and that the placer claimants had forfeited their claims by failure to file their notices as required by the statute.

The first notice is not seriously questioned, except that it is noted that the notice covers a two-year period, whereas it is contended the notices were to be filed annually. The answer to that objection is found in the statute itself which provided for a suspension of the annual assessment requirement from July 1, 1941 to July 1, 1943. (Act of May 7, 1942, 56 Stat. 271.)

The second notice is challenged because it was undated. The notices were filed on a printed form, which contained only a partial date to be completed by the claimant. The notice as it was filed read: 'For the year 194.....'. However, the notary certificate shows clearly that it was signed

on March 7, 1944, and recorded on that date, and it is sufficient to establish that the placer claimants intended to hold their claims for the year ending July 1, 1944. (Scoggin v. Miller, 189 Pac. 2d 677, Wyoming; Pine Grove Nevada Gold Mining Company v. Freeman, 171 Pac. 2d 366, Nevada; Donoghue v. Tonopah Oriental Mining Company, 198 Pac. 553.)

In the Donoghue v. Tonopah Oriental Mining Company case the Court said that a failure to comply literally with the provision suspending the assessment work was not an intention to abandon the claim, and that there had been an open and honest effort shown to comply and no fraud or deceit was involved, and that the notice was sufficient to hold the claim in that case. The Court noted in the opinion that in cases decided by the Land Department it had been so held where no notice of intention to hold the claim had ever been filed.

The notice filed March 7, 1944, was sufficient notice to the public that the locators of the placer claims intended to hold them for the year ending July 1, 1944.

The notices filed were sufficient to comply with the requirements of the moratoria statutes down to the critical year ending July 1, 1945. There is no question but that the placer claimants could file the notice for 1945 at any time prior to July 1, 1945 and that their interest in the claims would be valid until that date.

The complaint in condemnation filed March 20, 1945, and the order of possession filed March 30, 1945, gave exclusive possession of the land to the government as of March 30, 1945. On the date

on which the lode claims were filed, the land was subject to the valid claims of the placer claimants.

It is true that the notice to hold the claims for the year ending July 1, 1945, was not filed until July 11, 1945. However, when these lode claims were filed, the placer claims were valid, and the lode locators were trespassers. The evidence is clear that no permission was sought by the lode locators to go upon the placer claims to prospect for lode, and that no permission was ever granted by the placer claimants to the lode claimants. No valid mining claim can be initiated by the commission of a trespass, and any attempt to so locate a lode claim upon the property claimed by placer locators without the latter's permission is a trespass. (Clipper Mining Company v. Eli Mining Company, 194 U.S. 220.)

There can be no forfeiture for nonperformance of the assessment requirement until the time has expired in which it may be performed. (Jones v. Peck, 63 Cal. App. 397.)

For the reasons hereinabove enumerated, the lode claimants never did have a valid claim, because they had never asked for nor received permission to enter the land occupied by the placer claimants.

Aside from the fact that the lode claims were initiated by a trespass and are thereby void, there was no evidence whatever that the land in question had any lode in place. The statute provides that no location of a lode mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. (Title 30 U.S.C.A. section 23.) Section 185.12 of Title 43 of the Code of Federal Regulations provides:

'No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of bona fide prospectors, before sufficient work has been done to determine whether a vein or lode really exists.'

Section 185.12 of Title 43 of the Code of Federal Regulations provides:

'The claimant should, therefore, prior to locating his claim unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface.'

Section 37 of Title 30, U.S.C.A. provides:

'* * * where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.'

The placer claimants in the instant case not only testified that they did not know of any lode or vein on their placer claims, but they contend that none ever existed. Under the statute, the placer claimants would have the right to any lode which might subsequently have been discovered, if they did not know of its presence at the time of their placer locations.

The burden of proof is on subsequent locators to prove that the claim had been forfeited for

some failure to conform to the law. (Dennis v. Barnett, 30 Cal. App. 2d 145.)

The only testimony given at the hearing of this case on the subject of a lode in place was that of Mr. Compton who testified that no such lode or vein was present, and that the character of the soil formation was such that no lode or vein would normally be found in that area. Although one of the lode claimants, Mr. Beam, was present in court at the time, he did not offer any testimony or other evidence to rebut the testimony of Mr. Compton.

Under the order of this Court, entered October 15, 1956, jurisdiction was retained to make and enter such further orders and judgment as may be necessary and proper in the premises.

Under the evidence received in this case, and under the applicable principles of law, I find:

1. That B. J. Compton, Irma Compton, Harold Olson, Irma Olson, W. H. Montgomery, Roy Hooper, R. B. Walker, and Gene Delaney are entitled to distribution of the award of just compensation made on October 11, 1956 for Parcel 549, in accordance with the decree and judgment made on October 11, 1956, and that Robert Thomas, also known as Robert M. Thomas, Rheem Manufacturing Company, Great Lakes Carbon Company and Strate Line Pumice Company, Inc., have and none of them has any interest or right to said just compensation, and are not entitled to the distribution of any part thereof.

2. That B. J. Compton, Irma Compton, Harold Olson, Irma Olson, W. H. Montgomery, Roy Hooper, R. B. Walker, and Gene Delaney are entitled to distribution of the award of just

compensation made on October 11, 1956, for Parcel 552, in accordance with the decree and judgment made on October 11, 1956, and that L. Mills Beam, also known as L. Miles Beam, and Miles Beam, Rheem Manufacturing Company, Great Lakes Carbon Company, Strate Line Pumice Company, Inc., have and none of them has any interest or right to said just compensation, and are not entitled to the distribution of any part thereof.

Counsel for the plaintiff is hereby directed to prepare and file form of appropriate order for distribution of funds in accordance herewith.

The Clerk of this Court is directed to forthwith mail copies of this order to counsel for the parties.

Dated, November 25, 1957.

Gilbert H. Jertberg,
Judge, United States District Court."

II. ANY DECISION OF THE COMMISSIONER OF THE GENERAL LAND OFFICE DID NOT AFFECT THE STATUS OF THE APPELLEES AS COPARTNERS OF STRATE LINE PUMICE COMPANY.

The only showing of the existence of any action by the Commissioner, General Land Office, to invalidate the placer claims Strate Line Pumice Nos. 4 and 5, as originally located, and the subjects of amended locations in October, 1940, is that contained in the letters appended as Appendix "B" and "C" to the Appellants' opening brief. Personally, Appellees' counsel has not been able to find any such decision by the

inspection of the reported Decisions of the U. S. Department of Interior in the volume wherein a decision dated June 26, 1946 would ordinarily appear; and it seems the least Appellants should have done would have been to produce a certified copy of any such Decision. The letter from the Bureau of Land Management, itself, is clearly hearsay; and the contents of the letters are in no wise a refutation of the actual ownership of the claims by Appellees herein as copartners of Strate Line Pumice Company as "transferees" from the actual named locators of the placer claims who are identified in the Bureau's letter as being J. B. Compton, Don Compton, Irma Compton, Leora Compton, Walter Buass, Marie Compton, R. E. Galloway and Shirley Compton, who, except for J. B. Compton and Irma Compton, *are different persons* from the Appellees herein. It is certainly unplain how any declaration of forfeiture against these differently named persons would bind the Appellees herein. It is further shown in the Order for distribution heretofore copied into this brief in argument of Point I that the *Appellees herein, not* those who were the actual named locators of Strate Line Pumice Nos. 4 and 5 above named, were the ones who filed the notices of June 29, 1942, March 7, 1944 and July 11, 1945, during the period of suspension and moratoria. With these notices of record disclosing the interest of the Appellees herein, it is difficult to perceive how any Departmental action initiated to declare a forfeiture of the claims or invalidation of locations could affect Appellees as copartners of Strate Line Pumice

Company, without making them parties to the proceeding. Finally it does not appear that J. B. Compton and Irma Compton in their association with the other named locators of the Strate Line claims are named in their capacity as copartners of the other Appellees herein in the Strate Line Pumice Company. Because one may be an associate of "A" it does not follow that the same individual may not be a copartner of "B".

And on Appellants' assertion that the favorable result to Appellants in sustaining their answer to the proceedings instituted by the government to establish the land embraced within the two lode claims to be "nonmineral in character and that minerals had not been found within the limits of the claims to constitute a valid discovery," as indicated in the letter appended to the Opening Brief as Exhibit "C", became *res judicata* of their right to receive the awards of compensation herein as against the Appellees herein, it is submitted the position is not tenable. If such a proceeding were had, it was not an adversary proceeding between the Appellants and Appellees as private parties before the Bureau of Land Management, and could in no wise determine conclusively as between the Appellants and Appellees whether there was a "trespass" committed, or an overlapping or overlaying of valid placer locations in the possession of Appellees.

CONCLUSION.

It is respectfully submitted that the award and distribution to Appellees of the funds deposited into the registry of the court as just compensation for the condemnation and taking of Parcels 549 and 552 was just and proper and that the judgment of the lower court should be sustained.

Dated, Bakersfield, California,
November 3, 1959.

FREDERICK E. HOAR,
Attorney for Appellees
(Placer Claimants).